

Claimant requests the Board to affirm the ALJ's Order. Claimant argues his fall was witnessed by a co-worker, he notified respondent's owner of the accident the same day and was later provided a check to pay for the initial chiropractic treatment he received as a result of the accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On October 18, 2005, the claimant was on a scaffolding doing stone work when he fell 20-25 feet injuring his back, head and shoulders. Daniel Bartolon, a co-worker witnessed the claimant's fall. The claimant lifted his shirt and Mr. Bartolon noted claimant's back had scratches and red marks. Claimant then tried to contact the owner by telephone but was unsuccessful. He continued working and because that project was completed he then went to another job site. Roy Fuendling, respondent's owner, came to the second job site where claimant was working. The claimant then notified Mr. Fuendling about his injury that occurred earlier that day.

Q. Did you show Mr. Fuendling -- did you lift your shirt and show Mr. Fuendling your back before or after you did that?

A. After.

Q. What was Mr. Fuendling's response to you?

A. That I would take a position so he could urinate on me.

Q. Did you seek medical treatment that day?

A. No. I asked him and he said no.¹

Mr. Bartolon, testified that he observed claimant talking to Mr. Fuendling but could not testify regarding the actual conversation because he doesn't speak English. But Mr. Bartolon did observe claimant's gestures to Mr. Fuendling which indicated he was describing the fall and Mr. Bartolon observed claimant lifting his shirt to show Mr. Fuendling his injuries.

Mr. Fuendling denied claimant told him he had fallen at work and further denied that he requested the claimant to get into a position so that he could urinate on him. He further testified the claimant worked his normal job duties without accommodations after October 18, 2005. And he testified he did not learn of the alleged accident until a claim for compensation was received from claimant's attorney dated December 19, 2005. But he agreed that he gave claimant a check for \$600 to pay for 8 chiropractic treatments the claimant received before November 1, 2005, although he denied he had knowledge of the October 18, 2005 accident when he wrote the check. Mr. Fuendling testified:

¹ Vallejo Depo. at 10.

Q. There is already in evidence a \$600 check from your company to Jose Vallejo. It is dated November 1, 2005. Why did you write Jose Vallejo a \$600 check around November 1 of last year?

A. Because he told me that he had gone to a chiropractor and I go, 'Well, wonderful.' And he said, 'Is there any way you can pay for this because my back hurts?' I'm like, 'Okay. Why is it \$600?' He goes, 'He say to me I need to come back ocho times.' And I'm like, 'Well, why not ten times, why eight times? And 75 bucks? I got a guy that will do it for \$35.' 'Well, he close to my home.' I'm like, 'Whatever,' and that was it.²

Mr. Fuendling noted that his business has workers compensation insurance and if he had been aware claimant had a work-related accident he would have turned the claim in to his insurance carrier.

Claimant testified that the day after the accident he told Mr. Fuendling that he was hurting and was going to see a doctor and was told that was okay. Claimant sought treatment with Dr. Zafer, a chiropractor. The doctor's office note of claimant's October 20, 2005 office visit contains a history that claimant was injured in a fall from two floors onto some wires. Dr. Zafer recommended an MRI. Claimant testified that he brought Dr. Zafer's form to Mr. Fuendling the next day so the MRI would be authorized but Mr. Fuendling told claimant he did not have a right to the procedure because he did not have medical insurance. Claimant further testified that he also gave Mr. Fuendling a form from Dr. Zafer which referenced workers compensation and requested it be signed.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

Claimant described a fall from scaffolding and a co-worker also witnessed the fall. The contemporaneous medical record of claimant's visit to the chiropractor contained the same history of accident. Claimant has met his burden of proof that he suffered a work-related accidental injury in a fall at work on October 18, 2005. The Board is mindful that Dr. Jeffrey MacMillan circled an affirmative response to a question in a letter from respondent's counsel which asked if he agreed it was unlikely claimant was injured as alleged, given the lack of objective findings. But, again, the claimant and his co-workers

² Fuendling Depo. at 8.

³ K.S.A. 2005 Supp. 44-501(a).

⁴ K.S.A. 2005 Supp. 44-508(g).

testimony was corroborated by the chiropractor's initial office note and claimant's fall was not from 20 to 25 feet to the ground but instead was broken as he descended through the scaffold structure.

It is controverted whether claimant provided notice of that accident. Claimant testified that he told respondent's owner of the accident and requested medical treatment the day the accident occurred. A co-worker who does not speak English saw the claimant lift his shirt and show the owner his back and concluded claimant was describing the accident by the hand gestures used in the conversation with the owner. The owner denies he was told of the accident. The Board finds the testimony of claimant and his co-worker more persuasive and determines claimant provided timely notice of his accidental injury the day it occurred. The claimant's request for treatment and then respondent's payment of the chiropractor's bills raises a serious doubt that respondent was unaware claimant had injured his back at work and was seeking treatment for that condition.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Steven J. Howard dated July 25, 2006, is affirmed.

IT IS SO ORDERED.

Dated this 29th day of September 2006.

BOARD MEMBER

c: Michael L. Belancio, Attorney for Claimant
John F. Carpinelli, Attorney for Respondent and its Insurance Carrier